Chapter 9

Final Provisions: Commission, Entry into Force and Termination

9.1 Introduction

The Guide provides two final sample provisions. Versions of these provisions are found in most treaties:

- A provision establishing an institution responsible for the ongoing administration of the treaty;
- A provision describing the process by which the treaty, once adopted, enters into force and the rules applicable to the termination of the agreement.

9.2 Commission

Cross references

Section 6.13	Enforcement of investor obligations	372
Section 7.1	Investor–state dispute settlement	408
Section 7.2	State-to-state dispute settlement	483
Section 8.1	Investment promotion	493
Section 8.2	Technical assistance	499

Depending on the scope and nature of the obligations in an IIA, it is usually useful to have some kind of institution with representatives from both parties that are responsible for various tasks associated with the administration of the treaty. Only some IIAs provide for such an institution. Provisions for institutions are rare in BITs but more common in regional trade and investment treaties, such as FTAs.

9.2.1 IIA practice and options for institutional arrangements

Many traditional IIAs do not contemplate any form of institution.[1] In large part, this is because agreements did not contemplate ongoing co-operative activities by the parties. The Canadian model agreement is an exception in this regard. It provides for the establishment of a commission of ministerial-level representatives from both parties to supervise the implementation of the agreement, deal with disputes regarding its interpretation and adopt a code of conduct for arbitrators.[2] It may be desirable to add more elaborate provisions in an IIA regarding institutions. What institutions are needed, however, will depend on the obligations under the IIA, as

1 E.g. US model BIT, UK model IPPA, Indian model BIPPA.
2 Canadian model FIPA, Art. 51.

well as the resources of the parties and the nature and extent of their relationship. Where substantial ongoing co-operative activities of the kind contemplated in the sample provisions in the Guide are included in an IIA, a more elaborate institutional structure will be appropriate. In a broad-based regional integration arrangement, even more institutions will be needed. In COMESA,[3] for example, the member states have agreed to put in place a wide range of supportive institutions.[4]

9.2.2 Discussion of sample provision

The sample provision in the Guide contemplates the creation of a Commission charged with various responsibilities in connection with the administration of an IIA, including issuing authoritative interpretations of the agreement and performing other functions that have been referred to in the sample provisions in the Guide.[5] Each party state must appoint a ministerial-level person to the Commission. The scope of the Commission's responsibilities and the possible need for other institutions will vary depending on the nature of obligations in the IIA.

9.2.3 Sample provision: commission

Commission

1. The Parties hereby agree to establish a Commission, comprising ministerial-level representatives of the Parties or their designees.
2. The Commission shall:
   a. Supervise the implementation of this Agreement;
   b. Resolve disputes that may arise regarding its interpretation or application in accordance with [Guide sample provisions in Section 7.2 (State-to-state dispute settlement)];
   c. Determine the amount, type and duration of assistance to be provided by the Parties under [Guide sample provision in Section 8.1 (Investment promotion)];
   d. Establish a technical assistance committee in accordance with [Guide sample provision in Section 8.2 (Technical assistance)];
   e. Establish a code of conduct for dispute settlement in accordance with [Guide sample provision [H] (arbitrators) in Section 7.1 (Investor–state dispute

3 The COMESA Investment Agreement (2007) is part of a broad-based process of economic integration of the member states of the Common Market for Eastern and Southern Africa (Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe).

4 Similarly, the ASEAN Agreement (2009) contemplates a number of institutions (Art. 42), as does the SADC Investment Protocol (2006).

5 See Sample Art. [S] (Governing Law) in Section 7.1 (Investor–state dispute settlement); Section 6.15 (Grievance procedure and other measures to enforce the management plan produced in the sustainability assessment); Section 8.1 (Investment promotion); Section 8.2 (Technical assistance).

settlement)] and [Guide sample provision in Section 7.2 (State-to-state dispute settlement)]; and

f. Consider any other matter that may affect the operation of this Agreement.

3. The Commission may take such other action in the exercise of its functions as the Parties may agree, including amendment of the code of conduct for arbitrators.

4. The Commission shall establish its rules and procedures.

9.3 Termination of IIAs

Cross reference

Section 4.5 Scope of application 94

The burden of obligations imposed under an IIA is defined in part by how long such obligations remain in force. The term and termination provisions in IIAs vary to some extent. Investors seeking certainty with respect to their investments will prefer longer guaranteed terms. For host states, committing to a longer term in an IIA provides a stronger signal of its commitment to the obligations in the treaty. However, in light of the unexpected costs and other concerns that have arisen in connection with the application of IIA standards in investor–state dispute arbitration, states may prefer shorter minimum terms, so that if IIA obligations prove to be too burdensome, earlier termination is possible.

Another issue that is frequently the subject of IIA provisions is whether obligations to investors who have made investments in the host state while the treaty was in force should continue for some period of time after termination of the treaty. Investors will favour such commitments, but they mean that even after a state has decided to terminate an IIA, it will continue to be bound to its obligations in relation to all investors whose investments were in place at the time of termination for the period specified in the treaty.

9.3.1 IIA practice

While almost all IIAs address termination and the post-termination continuation of obligations, the approach varies. The US and Canadian model treaties both contemplate indefinite duration in the absence of some action to terminate by one of the parties. The Canadian model treaty allows termination at any time, with 12 months' notice to the other party, but remains in force for another 15 years for investments or commitments to invest made before termination.[6] The US model BIT

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6 Canadian model FIPA, Art. 52; Canada–Peru, Agreement between the Government of Canada and The Government of the Republic of Peru for the Promotion and Protection of Investments, signed 14 November 2006, in force 20 June 2007, Art. 52(3); Canada–Ecuador, Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, signed 29 April 1996, in force 6 June 1997, Art. XVIII(2). The provisions in the Indian model BIPPA are the same (Art. 15(a)).

allows termination only after ten years on one year's written notice. However, the provisions remain in force for investments established or acquired prior to termination for a further ten years.[7] Under the UK model treaty, the agreement remains in force for 10 years and thereafter may be terminated on 12 months' notice, as under the US model, but for investments made while the agreement was in force, the obligations continue for 20 years after the date of termination.[8]

Similar provisions are found in developing country agreements. For example, in the COMESA Investment Agreement, the agreement remains in force for ten years and continues in force for a further ten years unless the member states agree by consensus to terminate the agreement.[9] The agreement continues to apply to investments of investors from member states established or acquired prior to termination for ten years after termination. Individual members may withdraw on notice to the COMESA Secretary-General, but the agreement continues in force for another twelve months and, for investments of investors of other member states made prior to withdrawal, the obligations of the withdrawing member continue for five years after the date of withdrawal.[10] The India–Singapore CECA continues in effect for 15 years after termination in relation to investments made prior to termination, though no termination mechanism is specified.[11]

UNCTAD found that the average IIA term was ten years and after the expiry of that period most IIAs may be terminated on one year's notice.[12] UNCTAD also found that since 1995 the dominant approach in IIAs has been to have an indefinite term and to include clauses providing for survival of obligations for between five and twenty years for investment made prior to the termination of the treaty.[13] The IISD model seeks to provide more flexibility for host states. It allows a host state to protect its non-investment interests by permitting a party to terminate the treaty 180 days after giving written notice. For investments in place at the time of the termination, the rights and obligations under the IISD model remain in force for a further five years.[14]

7 US model BIT, Art. 22.

8 UK model IPPA, Art. 14. Under United Kingdom–Mexico, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States, signed 12 May 2006, in force 25 July 2007, Art. 27 allows termination after 10 years with 1 year's notice, with the provisions remaining in effect for investments made prior to the date of termination for a further 15 years. Under Art. 13 of Barbados–Germany, Agreement between Barbados and the Federal Republic of Germany for the Promotion and Protection of Investments, signed 2 December 1994, in force 11 May 2002, termination is permitted after 10 years or thereafter following a 1-year notice period in both cases. For investments made before termination, the treaty continues to be effective for a further 20 years.

9 COMESA Investment Agreement (2007), Art. 39.1 and 39.2. The same approach is taken in the Colombian model agreement (Art. XIII).

10 COMESA Investment Agreement (2007), Art. 39.3.

11 India–Singapore CECA (2005), Art. 6.24.

12 UNCTAD (2007), *Treaties 1996–2006*, op. cit., at 20.

13 UNCTAD (2010), *Denunciation of the ICSID Convention and BITS: Impact on Investor–State Claims*, IIA Issues Note No. 2, December 2010, United Nations, New York and Geneva, at 3.

14 IISD model treaty, Art. 57.

Box 9.1 Summary of options for termination provisions

1. *No fixed term*
2. *Fixed term*
3. *Continuation of obligations after termination of IIA for pre-termination investments*

9.3.2 Discussion of options

1. *No fixed term*

Without any fixed term, an IIA may be terminated at any time in accordance with whatever termination provision is included in the treaty, such as on 12 months' notice by one party. This provides limited certainty to investors and maximum flexibility for the host state. This flexibility may be curtailed in relation to existing investments at the time of termination, if the IIA provides that its obligations continue to apply to these investments for some specified period after termination.

2. *Fixed term*

A minimum fixed term provides less flexibility for host states, but more certainty for investors, though the certainty for investors diminishes every year as the end of the term approaches. Long term commitments to protect investors under IIAs limit the extent to which host states can avoid the treaty's restrictions on their ability to regulate foreign investor activity consistent with their other international obligations and development objectives. If the IIA has a long term of application, host states that find, over time, that the provisions of the IIA are not compatible with their development objectives and human rights and other obligations may not be able to simply withdraw and terminate their obligations under them within a reasonable time frame.[15]

One other consideration regarding fixed terms is what happens following the end of the term. Most IIAs provide that they continue subject to some right for each party to terminate with some period of advance notice. An IIA may also provide for termination at the end of the term or that that treaty continues in force only if both parties agree based on a joint review of the agreement and its effects.

3. *Continuation of obligations after termination of IIA for pre-termination investments*

Providing protection for existing investments after termination provides significant security for investors but substantially restricts the ability of host states to avoid obligations that they have found unacceptable. Long survival periods reduce the

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15 Schneiderman has compared the investor rights created by these treaties to constitution-like rights D Schneiderman (2000), 'Investment Rules and the New Constitutionalism', 25 *Law and Social Inquiry*, 757, at 771.

benefits to host states of IIA provisions that do not have a fixed term and can be terminated unilaterally by the host state.

9.3.3 Discussion of sample provision

Host states and investors sometimes have conflicting priorities in relation to term and termination provisions. Investors will generally want the longest guaranteed terms and lengthy post-termination protection for investments in place at the time of termination. States have an interest in attracting investment be agreeing to such provisions but, in light of concerns about IIAs, may also want flexibility to terminate without significant continuing obligations. The Guide sample termination provision takes a compromise approach. It follows recent IIA practice and provides for an indefinite term with a guaranteed minimum term of five years. After the expiry of the minimum term, termination by a party is possible at any time upon 180 days notice to the other party. Obligations in relation to investments in place at the time of termination continue for five years after termination. The periods for the term of the agreement, notice of termination and the survival of obligations in relation to investments in place at the time of termination are shorter than is common in current practice. States that decide that different terms and/or post-termination commitments better suit their needs can simply insert different time periods in the sample provision.

The sample provision also addresses when the treaty comes into force and provides that the annexes to the agreement are part of the parties' obligations under the treaty.

9.3.4 Sample provision: application and entry into force and termination

Application and Entry into Force and Termination

1. The Annexes hereto shall form integral parts of this Agreement.
2. Each Party shall notify the other Party in writing of the completion of the procedures required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the later of the two notifications.
3. This Agreement shall remain in force for a term of five (5) years from the date it enters into force. After the expiry of that term, this Agreement will remain in force unless either Party notifies the other Party in writing of its intention to terminate it. The termination of this Agreement shall become effective 180 days after notice of termination has been received by the other Party. In respect of investments made prior to the date when the termination of this Agreement becomes effective, the provisions of the Agreement shall remain in force for a period of five (5) years from the date of termination.